IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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| STATE OF WASHINGTON, | ) | No. 63078-4-I |
| | ) | |
| Respondent, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| PAUL PELTS, | ) | UNPUBLISHED OPINION |
| | ) | |
| Appellant. | ) | FILED: March 8, 2010 |
| | ) | |

Ellington, J. — When unnecessary elements are included in the to-convict jury instruction, the State assumes the burden of proving those elements. The to-convict instruction here did not contain any unnecessary elements, nor did the definitional instruction create any such element. And the court properly imposed the mandatory DNA fee. We affirm both conviction and sentence.

## BACKGROUND

On May 14, 2008, a team of Seattle police officers set up an undercover buy/bust operation in the Belltown neighborhood. One of the undercover officers asked Paul Pelts if he had crack cocaine, and he said yes. Pelts produced several small bindles of what appeared to be crack cocaine, and gave the undercover officer four of those bindles in exchange for $40 of prerecorded currency. One of the bindles was later analyzed and found to be consistent with aspirin, but not with any controlled

substance. The State charged Pelts with delivery of a substance in lieu of a controlled substance.

Pelts proposed a to-convict instruction patterned on WPIC 50.21, which read in pertinent part:

> To convict the defendant of the crime of delivery of a material in lieu of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 14th day of May, 2008, the defendant knowingly offered, arranged or negotiated for the delivery, sale, distribution or dispensing of a controlled substance;
>
> (2) That the defendant delivered an uncontrolled substance in lieu of the controlled substance; and
>
> (3) That the acts occurred in the [s]tate of Washington.[1]

The note on use following WPIC 50.21 recommends that it be accompanied by WPIC 50.07, which defines delivery.[2] Pelts proposed the following definitional instruction patterned on WPIC 50.07: "Deliver or delivery means the actual or constructive or attempted transfer *of a controlled substance* from one person to another."[3]

The State did not object to these instructions. The court adopted Pelts' to-convict instruction and a modified version of his definitional instruction: "Deliver or delivery means the actual transfer *of a controlled substance* from one person to another."[4]

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[1] Clerk's Papers at 20.

[2] "Deliver or delivery means the [actual] [or] [constructive] [or] [attempted] transfer of a [controlled substance] [legend drug] from one person to another." 11 Washington Pattern Jury Instructions: Criminal 50.07, at 960 (3d ed. 2008).

[3] Clerk's Papers at 23 (emphasis added).

The jury found Pelts guilty. As part of his sentence, he was ordered to pay the $500 victim penalty assessment and the $100 DNA collection fee.

[4] Clerk's Papers at 41 (emphasis added).

ANALYSIS

Pelts contends that by failing to object to the instruction defining delivery as the transfer of a controlled substance, the State assumed the burden of proving that he delivered such a substance, which the State failed to do.

Pelts is correct that the State must prove all the elements of the crime charged, and must also prove any otherwise unnecessary elements if they are included without objection in the to-convict instruction.[5] Pelts asks us to extend this reasoning beyond the to-convict instruction, alleging in a general manner that the law of the case doctrine applies to all instructions.

Pelts cites no case so holding and no case holding that an instruction defining terms in the to-convict instruction creates additional elements for the State's proof. Rather, Pelts relies upon State v. Braun,[6] which involved the definition of a deadly weapon for purposes of a special verdict. Braun contains no discussion of unnecessary elements.

Here, the definition was intended to help jurors understand the to-convict instruction.[7] Pelts was plainly charged with delivery of a substitute for a controlled

[5] State v. Hickman, 135 Wn.2d 97, 105, 954 P.2d 900 (1998).

[6] 11 Wn. App. 882, 526 P.2d 1230 (1974).

[7] See, e.g., State v. Marko, 107 Wn. App. 215, 219–20, 27 P.3d 228 (2001) (statutory definition of "threat" does not create additional elements of the crime of intimidating a witness and a jury unanimity instruction was not required); State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (statutory definition of "great bodily harm" does not add an element to the assault statute, rather it is intended to provide understanding); State v. Daniels, 87 Wn. App. 149, 156, 940 P.2d 690 (1997) (WPIC definition of "battery" not an element of assault by actual battery and the to-convict instruction not deficient for not including it); State v. Strohm, 75 Wn. App. 301, 308–09, 879 P.2d 962 (1994) (statutory definition of "traffic" does not create additional alternative means of committing the crime of trafficking in stolen property and juror

substance, and defining delivery in the standard way did nothing to alter the State's proof requirements. Pelts himself proposed the instruction, and cannot invite an error and be heard to complain of it on appeal.[8] Any prejudice to Pelts from the alleged inconsistency between these two instructions was created by Pelts. Pelts does not, however, contend there was any such prejudice. His argument fails.

Pelts also argues the court erred in failing to exercise discretion as to the DNA collection fee because the fee was not mandatory at the time he committed his offense. He contends his attorney was ineffective in failing to make that argument.

Pelt is correct that at the time of his offense in May of 2008, former RCW 43.43.7541 (2002) provided courts with discretion as to whether to impose the DNA collection fee:

> Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed.

But before Pelts was convicted or sentenced, the statute was amended to make imposition of the fee mandatory:

> Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed.[9]

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unanimity is not required on the alternative means).

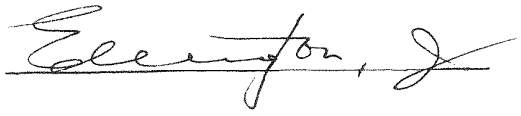
[8] See State v. Henderson, 114 Wn.2d 867, 871, 792 P.2d 514 (1990) ("Even where constitutional issues are involved, invited error precludes appellate review.").

[9] RCW 43.43.7541.

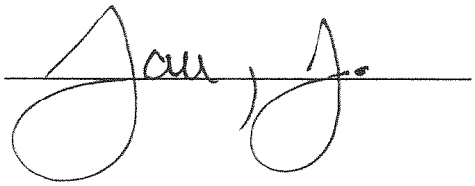
We held in State v. Brewster[10] that because the provision is not punitive, the amended statute applies where the crime is committed before the enactment but the offender is sentenced afterward. We thus reject Pelts' attempt to avoid the effect of the amendment. Our analysis in Brewster also leads us to reject Pelts' claims under the ex post facto clause.[11]

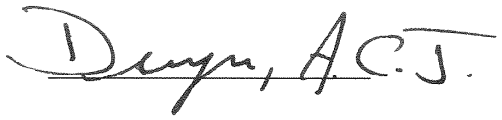
The court correctly imposed the mandatory DNA collection fee and defense counsel was not deficient in failing to argue otherwise.

Affirmed.



WE CONCUR:





[10] 152 Wn. App. 856, 861, 218 P.3d 249 (2009).

[11] See State v. Ward, 123 Wn.2d 488, 496–97, 869 P.2d 1062 (1994) (no ex post facto violation where provision is not punitive).